No. 82-1273

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF MAINE,

Petitioner,

v.

RICHARD THORNTON,

Respondent.

On Writ Of Certiorari To The Supreme Judicial Court Of The State Of Maine

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONSTRUED THE MAINE CONSTITUTION ARTICLE 1 SECTION 5 AND THE FOURTH AMENDMENT BY HOLDING THAT THE "OPEN FIELDS" DOCTRINE OF *HESTER* v. *UNITED STATES*, 265 U.S. 57 (1924), WAS INAPPLICABLE TO THE INSTANT CASE—WHEREIN POLICE OFFICERS WARRANTLESSLY ENTERED A HEAVILY WOODED AREA OF MR. THORNTON'S 38-ACRES RURAL PROPERTY WHERE THE PROPERTY WAS POSTED WITH NO TRESPASSING AND NO HUNTING SIGNS, ENCIRCLED BY A STONE WALL AND BARBED WIRE FENCE, WHERE THE AREA SEARCHED WAS A SECLUDED LOCATION IN HIS WOODS WHERE MARIJUANA WAS ALLEGEDLY FOUND, WHICH AREA COULD NOT BE SEEN FROM NEIGHBORING LANDS, MR. THORNTON'S HOUSE OR DRIVEWAY, AND WHERE MR. THORNTON EXCLUDED THE PUBLIC FROM HIS LAND.

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The opinion of the Maine Supreme Judicial Court affirming the trial court's decision to suppress the seized evidence is reported at *State* v. *Thornton*, 453 A.2d 489 (ME. 1982), which reported opinion is reproduced in Respondent's Response to Petition for a Writ of Certiorari in the appendix at pages A1 through A8. This opinion is also reproduced in the appendix of the State of Maine's printed Petition for a Writ of Certiorari at pages A1 to A26.

The order of the Superior Court of Maine suppressing the evidence seized is reproduced in the appendix of the printed Petition for a Writ of Certiorari at pages B1 to B8.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Supreme Judicial Court of Maine, in *State* v. *Thornton*, 453 A.2d 489 (Me. 1982), was entered on December 6, 1982, and the Court's mandate issued on the same day. The State of Maine's Petition for a Writ of Certiorari was timely filed on January 31, 1983, within the 60-day filing period set forth in U.S. Sup. Ct. Rule 20.1.

Respondent however states there is sufficient reason to dismiss the Writ on the basis that the opinion of the Maine Supreme Judicial Court was made on adequate and independent state grounds, which argument will be discussed below.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, § 5 of the Maine Constitution provides as follows:

> The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.

17-A Maine Revised Statutes Annotated provides as follows:

> § 1106. Unlawfully furnishing scheduled drugs
>
> 1. A person is guilty of unlawfully furnishing scheduled drugs if he intentionally or knowingly furnishes what he knows or believes to be a scheduled drug, and which is, in fact, a scheduled drug, unless the conduct which constitutes such furnishing is either:
>
> A. Expressly authorized by Title 22; or
>
> B. Expressly made a civil violation by Title 22.
>
> 2. Violation of this section is:
>
> A. A Class C crime if the drug is a schedule W drug; or

B. A Class D crime if the drug is a schedule X, Y or Z drug.

3. A person shall be presumed to be unlawfully furnishing a scheduled drug if he intentionally or knowingly possesses more than 1¼ ounces of marijuana.

STATEMENT OF THE CASE

On August 3, 1981, Carroll E. Crandall, Maine State Trooper filed an affidavit describing his warrantless search of Respondent Richard Thornton's property and also describing the information given to him by a "reliable, cooperating citizen." The affidavit appeared in pertinent part as follows:

> On information and belief supplied by a *reliable, cooperating citizen* that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area *behind the residence of Richard Thornton* at Davis Corner Road, Hartland, Maine.
>
> That your affiant *went to said wooded area* on August 3, 1981, and discovered marijuana plants growing at the place and position behind the said residence as described by said reliable informant. (Emphasis Supplied)

(J.A. 5).

Trooper Crandall testified at the suppression hearing that said unidentified informant did observe "what he thought to be" marijuana plants growing in a wooded area "behind the residence" of Richard Thornton (J.A. 27). However, at that time Officer Crandall "didn't know who owned the property" (J.A. 37), but "just figured it in [his] own mind that it was on Mr. Thornton's property" (J.A.

38). In fact, Officer Crandall testified that "the informant didn't tell me what property it was, he didn't know" (J.A. 61).

Trooper Crandall testified that he didn't get a search warrant because of the informant's tip prior to searching the Respondent's property because "he didn't know exactly where the marijuana was, nor whose property it was on," and "didn't feel without checking it that [he] had enough information" (J.A. 68).

As described in the affidavit, Trooper Crandall and Constable Arnold Halford went to the Thornton property on the morning of August 3, 1981, and made a warrantless search for marijuana, stating "we just walked in and observed where the . . . patch was, and then backed off." (J.A. 68). They didn't seize the marijuana at that time because the officer figured if he was going to seize it "right," he "should probably get a warrant." (J.A. 68).

The officers testified that they entered the Thornton property by walking over the land belonging to the "Leavitts" (J.A. 121, 122, 32-36) travelling in a northerly direction approximately 200 to 300 feet behind the Leavitt mobile home and reached an overgrown tote road (J.A. 73, 74) which led from the Thornton driveway (J.A. 90, 91). They followed the tote road from the main road (Davis Corner Road) not more than five hundred feet and found two small fenced-in enclosures where they believed marijuana was growing. (J.A. 71, 72).

The area where Respondent resides is a rural area (J.A. 30, 41) and the specific land is owned and occupied by Mr. Thornton and is heavily wooded (J.A. 73, 74). Respondent owns approximately 30 acres there. (J.A. 84). The boundaries of his property are marked by an old stone wall and a barbed wire fence that goes all around

the property (J.A. 89). Even though the stone wall was old, it was not possible to get into the land without knowing that you were going over it. (J.A. 111, 112). In addition, the perimeter of the property was posted with No Trespassing signs from both the main road (Davis Corner Road) and where one would come onto the property from another's land (J.A. 89, 90, 91, 92). There were approximately nine No Trespassing signs, three of which were posted on the Davis Corner Road (J.A. 90). No individuals were allowed to routinely pass through the Thornton property to get to the road or to any other property (J.A. 100, 101).

The two alleged marijuana patches were found approximately 250 feet from Respondent's driveway and adjacent to an overgrown foot path or so-called tote road (J.A. 96), not 500 feet from Thornton's house as stated by Petitioner in its brief at page 5.

The footpath or "tote" road was described throughout the hearing as being grown up. Trooper Crandall described the footpath as follows: "Well, it hadn't been used by a vehicle for quite some time. There was nothing to indicate that it had been used for anything other than a footpath" (J.A. 39).

Respondent's wife, Linda Thornton, described where the footpaths were on Exhibit 12 (an aerial photograph of the property) (J.A. 22), (Pl. Ex. J.A. 54, 55, 57) and testified that the footpaths had grown up considerably since 1975 when the photo was taken (J.A. 85). Constable Halford corroborated the description by agreeing that the woods road was basically a footpath. (J.A. 121). The fenced-in enclosures where marijuana was allegedly found were not visible from the public road, from Respondent's driveway or residence or from any other point outside Respondent's property (J.A. 94, 95, 62, 63, 64, 65).

When Trooper Crandall was asked why he waited three days after receiving the informant's tip before he got a search warrant, he testified that he "figured the marijuana was still there, and there didn't appear to be anybody right near it at the time . . ." (J.A. 67, 68).

After making his warrantless search, Trooper Crandall obtained a search warrant from the complaint justice of the Somerset County District Attorney's Office. (J.A. 39, 40). He and Constable Halford then, along with other police officers, made a second search of Respondent's property, where a small amount of marijuana was allegedly seized.

On August 3, 1981, Respondent Thornton was given a complaint for unlawfully furnishing Schedule Z drugs in violation of 17-A Maine Revised Statutes Annotated (M.R.S.A.), section 1106. (J.A. 14-15).[1]

On April 9, 1982, Morton A. Brody, Justice, Maine Superior Court, granted Respondent Thornton's motion to suppress for use as evidence, articles and items that were unlawfully seized from the property of Respondent, as well as all statements and/or admissions that may have been made by Thornton as the result of said illegal search and seizure, as well as testimony or comment. (Pet. App. B3-B8).

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[1] It is significant to note that Respondent Thornton was charged with "furnishing" because under Maine Law the possession of any amount of marijuana exceeding one and one-half (1½) ounces constitutes the charge of "furnishing marijuana." In the present case, Officer Crandall testified that the police had no evidence that Respondent Thornton was actually furnishing marijuana to anyone. (J.A. 42).

The Superior Court Justice noted that the District Attorney at the hearing,

> Abandoned any claim that the informant citizen was reliable and credible enough that his information, standing alone, constituted probable cause for the warrant which issued. At any rate, no evidence as to the grounds upon which that informant's reliability or credibility could be established, *or any evidence of corroborating circumstances* as to the informant's observation, appears in the affidavit or was introduced at the hearing, beyond the conclusionary allegation of reliability. Absence such support for the informant, probable cause for the warrant must be based on the observations of the affiant officer. (Emphasis Supplied.)
>
> The central issue on this motion, then, is whether the visit by Trooper Crandall to the Defendant's property on July 31, 1981, which the District Attorney conceded was a warrantless search, comes within any exception to the warrant requirement . . . The State bears the burden of proof on this issue. If no such exception is found, then the search would be unlawful, and thus tainted, and observations made cannot serve to provide probable cause for the warrant.

(Pet. App. B2-B3)

The Court noted further that the testimony of both Trooper Crandall and Constable Halford[2] indicated that they had no license to be on the Respondent Thornton's property; their intent was to corroborate the informant's tip. While noting the fact that the fenced enclosures where the marijuana was allegedly found were not visible from either the public road, from Thornton's driveway or residence, or from any other point outside the property

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[2] Incorrectly spelled in the Order as "Hartford."

upon neighboring land and that the perimeter of the property was posted with a number of No Trespassing signs and that the property was bounded by the stone wall and barbed wire fence, the Maine Superior Court held:

> As is evident from the secluded location chosen for his horticultural enterprise, the Defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates that the Defendant had a reasonable expectation of privacy thereon. The officers were not innocently upon any property *open to the public* (the footpaths or tote road was evidently not a public way), or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana . . . the Court does not find that either the plain view or open fields exception to the warrant requirement is applicable . . . (Emphasis Supplied.)

(Pet. App. B. 5, 6)

The Superior Court went on to distinguish this case from the case of *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), noting that the inspector in that case entered the premises where the public had not been excluded. (Pet. App. B. 6)

Accordingly, the Superior Court found that the warrantless search was an unreasonable and unlawful violation of the Defendant's rights and the observations from it could not provide probable cause for the subsequently issued warrant.

The State of Maine took an appeal to the Maine Supreme Judicial Court. Petitioner argued that Thornton had no expectation of privacy in the property searched

because Petitioner claimed that the area searched was "open." Petitioner also contended that the Superior Court had found that the "open fields" doctrine was not viable even though the Superior Court Justice did not so hold and stated that the doctrine was, in fact, still viable. (Pet. App. B. 6)

The Maine Supreme Judicial Court affirmed the opinion of the Superior Court holding that the Respondent had a reasonable expectation of privacy in the area searched and that the "open fields" doctrine was not applicable to justify the observations by the police officers on Respondent's land as the Respondent made every effort to conceal his activity, and the officers were never legitimately on the property since they entered the land without a warrant and within no exception to the warrant requirement for the specific purpose of verifying the information to be used against the Respondent. (Pet. App. A22, A23, A25, A26)

SUMMARY OF ARGUMENT

Petitioner, State of Maine, has not shown that the judgment of the Maine Supreme Judicial Court did not rest on an adequate and independent state grounds. *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958). The Maine Supreme Judicial Court analyzed its entire record of Maine cases regarding the area of search and seizure and noted that those cases were in accord with *Katz* v. *United States*, 389 U.S. 347 (1967), in holding that Respondent Thornton had a reasonable expectation of privacy in the area searched on his private property. Further, the Maine Supreme Judicial Court noted that the "open fields" doctrine was still viable in Maine, and cited case law to support its conclusion. (Pet. App. 20)

While Petitioner does not contend that the Maine Supreme Judicial Court granted Respondent Thornton more rights than those guaranteed by the United States Constitution, certainly state courts are always free to grant individuals more rights than those guaranteed by that Constitution, so long as it does so on the basis of state law, therefore, pursuant to this and the above analysis, the Writ of Certiorari should be dismissed as improvidently granted and/or the Judgment should be affirmed.

The Maine Supreme Judicial Court was correct in holding that pursuant to state law the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924) was not applicable to the instant case. The evidence in the present case indicates that the *wooded* area where the marijuana was allegedly growing, was within two fenced enclosures, was adjacent to an overgrown footpath or so-called tote road in the western part of Respondent's 38-acre rural property. The enclosures were not visible either from the public road, from Respondent's driveway or residence in the eastern part of the property, or from any other point outside the Respondent's property, upon neighboring land. The perimeter of the Respondent's property was posted with a number of signs prohibiting trespassing and hunting, and was encircled by barbed wire and stone wall. Using both the *Katz* analysis of a reasonable expectation of privacy, as well as previous Maine case law, and rejecting the applicability of the "open fields" doctrine to the facts of the present case, the Maine Supreme Judicial Court correctly held that the warrantless search was a violation of Respondent's right, in that Respondent's conduct evidenced the clear expectation of privacy for the above reasons and also because Respondent generally excluded the public from his land.

The Maine Supreme Judicial Court's analysis of the applicability of a reasonable expectation of privacy analysis to search and seizure questions was exhaustive wherein the court followed both the subjective and objective standards set forth in the concurring opinion in *Katz*, 389 U.S. at 361.

Petitioner's contention that any subjective expectation of privacy in a wooded area, even one that is fenced, posted and secluded, is *per se* unreasonable flies in the face of previous Maine case law wherein the Maine Supreme Judicial Court stated that "it has never been the law of the State of Maine that any expectation of privacy for activity conducted in an area accessible to the public is *per se* reasonable." (Pet. App. A19)

Petitioner's *per se* rule that any subjective expectation of privacy in a wooded area is always objectively unreasonable for purposes of the Fourth Amendment protection must fail because it contemplates an extremely restrictive reading of *Katz* and ignores *Katz's* rejection of *Olmstead's* constitutionally protected area analysis. *Olmstead* v. *United States*, 277 U.S. 438 (1928). Petitioner's theory also transforms the area searched in the present case which was not even a field, as a matter of fact, into an "open" field. In addition, the tenor of the *Katz* opinion is that it changed the standard Fourth Amendment protection in most, if not all, factual situations.

Even the most recent case of *Air Pollution Variance Board* v. *Western Alfalfa*, 416 U.S. 861 (1974) where the "open fields" doctrine was applied is distinguishable from the present case. In *Air Pollution Variance Board*, the inspector was on the premises from which the public had not been excluded. *Id.* at 865.

Further, the Maine Supreme Judicial Court was correct in applying its prerequisites for determining whether the "open fields" doctrine applied: (1) the openness of which the activities were pursued and (2) the lawfulness of the officer's presence during their observation of what is open and patent. First, if the activity was not pursued in the open, it could not be an open field. Second, the lawfulness of the officer's presence was analyzed in *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974) and in *Harris* v. *United States*, 390 U.S. 234 (1968) where the "open fields" doctrine was applied to both cases.

ARGUMENT

I. The Judgment Of The Maine Supreme Judicial Court Rested On Adequate And Independent State Grounds.

Where an adequate and independent State ground exists for a decision, this Court does not review the federal question in order to preserve the proper division of authority between state and federal courts. *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875). In the case of *Herb* v. *Pitcairn*, 324 U.S. 118, (1945), this Court stated:

> . . . Our only power over state judgments is to correct them to the extent that they indirectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views on federal laws, our review could amount to nothing more than an advisory opinion.

325 U.S. 118 at 125-126.

State courts are the final interpreters of State Law even though their actions are reviewable under the Federal Constitution. The Supreme Court of any state is

the highest court in terms of this body of law and it is not a "lower court," even in relation to this Court. It must follow this Court's rulings on the meanings of the Constitution, but it is free to interpret State Laws or the State Constitution in any way that does not violate those principles. See generally *Herb* v. *Pitcairn*, *Id.*

The State of Maine has consistently recognized that its standard for testing a legality of a search and seizure can be no *lower* than the constitutional standards mandated by the Constitution of the United States as interpreted by the United States Supreme Court. *State* v. *Barlow*, 328 A.2d 895 (Me. 1974), *State* v. *Hawkins*, 261 A.2d 255 (Me. 1970). The Maine Supreme Judicial Court has never noted that the standard for testing the legality of the search and seizure must be exactly that which has been interpreted by the United States Supreme Court.

The State's power is an extremely important one, for it means that the State Courts are always free to grant individuals more rights than those guaranteed by the Constitution, so long as it does so on the basis of State Law. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). The Federal Constitution establishes *minimum* guarantees of rights and the granting of additional liberties does not violate its provisions.

It follows that as the state courts are not "lower courts," they are not required to follow the interpretation of lower federal courts, such as the Court of Appeals with jurisdiction over their state territory, even on matters relating to the Constitution of the United States. Certainly in the present case, the Supreme Judicial Court of Maine is not bound by the Court of Appeals' decision in *United States* v. *Oliver*, 686 F.2d 356 (6th Cir. 1982)

decided in a court which does not have jurisdiction over this state territory.[3]

In a recent case, the Writ of Certiorari was dismissed as improvidently granted when it was found that the judgment of the court below rested on independent and adequate state grounds. *Florida* v. *Constantino Casal and Omar Garcia*, 51 U.S.L.W. 48827 (No. 81-2318), decided June 17,1983. In that case, this Court concluded that the Florida Supreme Court relied on independent and adequate state grounds when it affirmed the suppression of over 100 pounds of marijuana discovered aboard a fishing vessel. In that case, the Florida Court did not *expressly* declare that its holding rested on state grounds, and the principal case cited for the probable cause issue was based upon this Court's interpretation of the Fourth Amendment of the Federal Constitution.

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[3] It is significant to note that the Maine Supreme Judicial Court decided *Maine* v. *Thornton*, 453 A.2d 489 (Me. 1982) in a manner consistent with the First Circuit Court, as will be discussed below.

Since *State* v. *Thornton*, *Id.* and *United States* v. *Oliver*, 686 F.2d 356 (1982) have been consolidated for purposes of this Court's review, it may be helpful to generally distinguish the two cases.

In *Oliver* the size of the "field" was approximately 8 acres; however, in *Thornton* there was no field, there was only a cleared area measuring less than an eighth of an acre; in *Oliver* the police searched by traveling the farm road and in *Thornton* the police went through the woods via an overgrown footpath; in *Oliver* the property was leased to a third-party; in *Thornton* the property was owned by *Thornton* himself; the geography in *Oliver* was partly wooded and partly open, and in *Thornton* it was exclusively wooded except for the two tiny areas searched and a small vegetable garden; the *Oliver* property was blocked by a gate and fence on one side; in *Thornton* the entire area was surrounded by either a stone wall or a barbed wire fence, and the area where the marijuana was allegedly found was also separated by a chicken wire fence.

Respondent is certainly not arguing that the decision of the Maine Supreme Judicial Court is inconsistent or even broader than the rulings of this Court on the applicability or interpretation of the Fourth Amendment; however, Petitioner's argument is only that this state should not be put to the test in the current case, because if there is inconsistency, that inconsistency would be a grant of more protection to its citizens against unreasonable searches and seizures, which is permissible.

Even though the Supreme Judicial Court in the present case made reference to the Fourth Amendment of the Constitution and *Katz* v. *United States*, 389 U.S. 347 (1967), that does not mean that their decision did not rest on independent and adequate grounds. It is clear that even though the above citations were included in the court's opinion that the court was relying on its own state law when it suppressed the evidence in the present case. The Maine Supreme Judicial Court stated in its opinion after discussing *Katz* and *Hester:*

"The Maine cases are in accord. *We* noted after *Katz* that:

> [T]he issue of whether government action does or does not constitute a search is understood to depend less upon the designation of the area . . . than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.
>
> *State* v. *Gallant*, 308 A.2d 274, 278 (Me. 1973) . . . *State* v. *Sapial*, 432 A.2d 1262, 1266 (Me. 1981) . . .*State* v. *Rand*, 430 A.2d 808, 818 (Me. 1981) . . . *Sweatt*, 427 A.2d at 945 . . . *State* v. *Albert*, 426 A.2d 1370, 1373 (Me. 1981) . . . *Blais*, 416 A.2d at 1256, *State* v. *Johnson*, 413 A.2d 931, 933 (Me. 1980) . . . *State* v. *Littlefield*, 408 A.2d 695, 697 (Me. 1979) . . . *State* v. *Barclay*, 398 A.2d 794, 798 (Me. 1979) . . .

> *State* v. *Dow*, 392 A.2d 532, 535 (Me. 1978) . . . *State* v. *Cowperthwaite*, 354 A.2d 173, 175-76 (Me. 1976) . . . *State* v. *Hamm*, 348 A.2d 268, 272 (Me. 1975) . . . *State* v. *Crider*, 341 A.2d 1, 4 (Me. 1975) . . . *State* v. *Koucoulas*, 343 A.2d 860, 868 (Me. 1974) . . . *State* v. *Richards*, 296 A.2d 129, 134 (Me. 1972) . . . *State* v. *Stone*, 294 A.2d 683, 688-89 (Me. 1972) . . . *Poulin*, 268 A.2d at 480, *McKenzie*, 161 Me. at 137 to 210 A.2d at 32. (453 A.2d at 493-494)
>
> . . .
>
> It has never been the law of *this state* that any expectation of privacy for activity conducted in an area accessible to the public is *per se* unreasonable . . . (citing *State* v. *Crider*, 341 A.2d 1 (Me. 1975).

Even in the Court's discussion of the "open fields" doctrine, the Maine Supreme Judicial Court clearly ruled on a standard established in Maine regarding the applicability of the "open fields" doctrine.

> "*In Maine*, for the "open fields" doctrine to apply, two factual aspects of the circumstances must be considered . . . *Peakes*, 440 A.2d at 353 . . . *Dow*, 392 A.2d at 535 . . . *Stone*, 292 A.2d 689."

453 A.2d at 495.

Even if the judgment of state court rests on two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction must fail if the non-federal ground is independent of the federal ground and adequate to support the judgment. See *Fox Film Corporation* v. *Muller*, 296 U.S. 207 (1935). Therefore, even if the Maine Supreme Judicial Court did not mention the Fourth Amendment or *Katz*, it is clear that the Court's opinion rested on adequate and independent state ground, as certainly the evidence would be suppressed under the Maine Supreme Judicial Court's exhaustive analysis.

Petitioner, therefore, has not shown that the judgment of the Maine Supreme Judicial Court did not rest on adequate and independent state ground. *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958).

II. The "Open Field" Doctrine Of *Hester* v. *United States*, 265 U.S. 57 (1924), Is Not Applicable To The Instant Case.

Petitioner contends that the Maine Supreme Judicial Court erroneously held that Respondent Thornton was entitled to Fourth Amendment protection pursuant to *Katz* v. *United States*, 389 U.S. 347 (1967), wherein he was found to have had a reasonable expectation of privacy. The State also contends that the Maine Supreme Judicial Court did not explain why Thornton's subjective expectation of privacy was objectively reasonable (Br. 14, 15). Petitioner does not contest the finding that Thornton had a subjective expectation of privacy.

Although the Maine Supreme Judicial Court did cite *Katz* v. *United States*, 389 U.S. 347 (1967), it is clear that its decision relied on the Court's analysis of an individual's right under the Maine Constitution and previous Maine case law. The Supreme Judicial Court noted that the Maine cases after *Katz* are in accord with the *Katz* decision, 453 A.2d at 493-494. After conducting a thorough examination of the Maine cases where a reasonable expectation of privacy analysis was used, the Maine Supreme Judicial Court went on to state that in the present case, Respondent Thornton's conduct evidenced a clear expectation of privacy. 453 A.2d at 494-495; Pet. App. A. 18, 19.

> He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

453 A.2d at 494; Pet. App. A. 18.

The Maine Supreme Judicial Court did not "assert without further explanation" as Petitioner contends that Thornton's "subjective expectation of privacy was objectively reasonable." (Br. 15). To the contrary, the Court explained that it had never been the law of the State of Maine that any expectation of privacy for activity conducted in an area accessible to the public is *per se* unreasonable. Rather, the Court stated that the proper inquiry must be:

> Having in mind the purposes to be served by the Fourth Amendment, made applicable to the States by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entering by responding to the following relevant inquiry, what under all the existing circumstances, if any, wholly defeated or partially reduced under the law the *reasonable expectation* of privacy which the occupants . . . had a right to entertain? (Emphasis Supplied.)

Crider, 341 A.2d at 5. 453 A.2d at 495; Pet. App. A. 19.

The Maine Supreme Judicial Court found nothing that could be taken to have wholly or partially defeated or reduced Respondent Thornton's reasonable expectation of privacy except the officers' search of Respondent's property.

It is interesting to note that Petitioner contends that *Katz* does not apply to the facts of the present case, however, it argues that Respondent has not proven that his subjective expectation of privacy was objectively reasonable pursuant to the theory set forth in *Katz*.

In any case, Petitioner erroneously infers that the Maine Supreme Judicial Court found only that Respondent had a "subjective" expectation of privacy (Br. 15). The Maine Supreme Judicial Court, as well as the Maine

Superior Court, were thoroughly versed with the test set forth in the concurrence in *Katz* which required that the subjective expectation or privacy be one that society is prepared to recognize as reasonable. 389 U.S. at 361.

In both Respondents' brief to the Maine Superior Court and in the brief to the Maine Supreme Judicial Court, the above test and case law were discussed showing that Respondent's expectation of privacy was clearly objectively reasonable. Recent case law, including the case of *Smith* v. *Maryland*, 472 U.S. 735 (1979), has followed *Rakas* v. *Illinois*, 439 U.S. 128 (1978) and other cases decided by this Court, in holding that a subjective expectation of privacy is reasonable if it: (1) is a privacy expectation normally shared by people in that setting; and (2) it falls within some tolerance level which represents the limits of what society can accept given its interest in law enforcement. *Rakas* at 439 U.S. at 143-144 n. 12. See also *Katz* v. *United States*, 389 U.S. at 361 (concurring opinion).

It is clear also that this Court has continued to follow *Rakas*, *Id.* in its most recent case of *Illinois* v. *Gates*, 51 U.S.L.W. 4709 (No. 81-430) (decided June 8, 1973), and a strict application of Fourth Amendment protection against *warrantless* searches, wherein this Court stated:

> This evolvement in the understanding of the proper scope of the exclusionary rule embraces several lines of cases. First, standing to invoke the exclusionary rule has been limited to situations where the Government seeks to use such evidence against the victim of the unlawful search. *Brown* v. *United States*, 411 U.S. 223 (1973); *Alderman* v. *United States*, 394 U.S. 165 (1969); *Wong Sun* v. *United States*, 371 U.S. 471, 491-492 (1963); *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

Illinois v. *Gates*, 51 U.S.L.W. 4709 at 4720.

In the present case it is clear that Respondent's subjective expectation of privacy was reasonable. The facts are similar to those in the *United States* v. *Holmes*, 521 F.2d 859 (6th Cir. 1975), in which the government appealed an order granting motions to suppress marijuana seized by a warrantless search. In arguing that the owners had no expectation of privacy, the Court disagreed with the government, observing:

> The government would have us ignore the *character* of the Moody property. Whatever precautions a homeowner in an urban area might have to take to protect his activity from the senses of the casual passerby, a dweller in a *rural area whose property is surrounded by extremely dense growth need not anticipate that government agents will be crawling through the underbrush* by putting up signs warning the government to keep away. Even in the present case, the Respondent did put up signs prohibiting trespassing. (Emphasis supplied).

521 F.2d at 870.

The right of a property owner to exclude others creates the presumptively legitimate expectation of privacy. [See *Rakas*, 439 U.S. at 144 n. 12 ("one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude").]

The Maine Supreme Judicial Court also noted that Thornton made every effort to conceal his activity, nothing about his enterprise was open, patent or knowingly exposed to the public. The Court further noted that under the circumstances the State failed to demonstrate the legitimacy of the officers' position of observation and the openness of the conduct of Thornton to prove that Respondent's subjective expectation of privacy was not objectively reasonable. 453 A.2d at 494-495; Pet. App. A. 18, 19, 22, 23.

Recent case law has established that a subjective expectation of privacy is reasonable if it: (1) is a privacy expectation normally shared by people in that setting; and (2) it falls within some tolerance level which represents the limits of what society can accept given its interest in law enforcement. See generally *Mincey* v. *Arizona*, 437 U.S. 385 (1978); *U.S.* v. *Dorsey*, 591 F.2d 922 (D.C. Cir. 1978).

In the present case, Respondent's expectation of privacy was a reasonable one. Society's interest in law enforcement was not unduly hampered by requiring a warrant prior to searching Respondent's private property. Certainly the Fourth Amendment warrant requirement has not prevented satisfactory law enforcement in other areas in which it has been applied. The policy is to encourage officers of the law to seek to the fullest extent feasible the objective judgment of a magistrate on the probability that a crime is being committed *before* permitting entry on the property of private citizens. The device of the intervening step between clues and search is calculated to substitute the inferences of a neutral and detached magistrate for the inferences of a committed officer in the heat of ferreting out crime. *Rosencranz* v. *United States*, 356 F.2d 310 (1st Cir. 1966). Society cannot reasonably expect Thornton to build solid, impenetrable walls around his secluded property. *Burkholder* v. *Superior Court*, 96 Cal.App.3d 421, 158 Cal.Rptr. 86 (1979).

A. In terms of *Katz*, *Hester* does not represent a *per se* rule that any subjective expectation of privacy in open fields or wooded areas is unreasonable.

Petitioner contends that *Hester* in a modern Fourth Amendment analysis should stand for the proposition that any subjective expectation of privacy, not only an open field but also any wooded area, even one that is

fenced, posted and secluded, is *per se* unreasonable, and, therefore, the Maine Supreme Judicial Court's two prerequisites for applying the "open fields" doctrine are inappropriate.

Petitioner cites *Katz*, for the proposition that the Fourth Amendment's reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." (Br. 27). Petitioner then sets forth its own theory that any trespass or intrusion by a police officer on an individual's land should not even be *considered* when deciding upon the reach of the Fourth Amendment. Petitioner goes on to say that the State's use of the two prerequisites to the application of the "open fields" doctrine is inappropriate (Br. 29).

Petitioner attempts to invalidate the use of the lawfulness of the officers' presence "as a prerequisite to the application of the 'open fields' doctrine." However, this application cannot be inappropriate because an individual's "legitimate expectation of privacy" must be *invaded* by the government; if there is no invasion, there is no constitutional violation (i.e., no search). Therefore, the State's prerequisite involving the lawfulness of the officers' presence merely goes to the proposition that there must be an invasion of an expectation of privacy, and in the present case, there must have been a "search" by the police officers.

Pursuant to the above analysis then, under Maine law and the opinion of *State* v. *Thornton*, a police trespass may constitute an invasion of a constitutional right; however, there is no *per se* invasion. Contrary to Petitioner's contention, the State Court's opinion does not *turn* on the

fact that there was a physical trespass. To the contrary, the Maine Supreme Judicial Court stated that:

> The State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not *objectively* reasonable and that, therefore, police observations do not constitute a search.

In the present case, the Court went on to say:

> . . . the officers were never legitimately on Defendant's property; they entered the Defendant's land without a warrant, *and within no exception to the warrant requirement*, for the specific purpose of verifying information to be used, ultimately against him. (Emphasis Supplied)

Thornton, 453 A.2d at 495-496; Pet. App. A22-A23.

It is important to note that the Maine Supreme Judicial Court cited various Maine cases where there was a physical trespass by police officers which trespass *did not* constitute an "invasion" (or search) protected by the Fourth Amendment, such as *State* v. *Johnson*, 413 A.2d 931, 933 (Me. 1980) (Knowledge of dead body on premises created exigent circumstances permitting warrantless entry); *State* v. *Crider*, 341 A.2d 1 (Me. 1975) (No invasion of privacy when police enter without force, in hallway of multi-unit dwelling in furtherance of investigation).

Petitioner's assumption that because the Court in *Katz* stated that "the reach of the Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure" does not mean, as Petitioner infers, that *Katz* stands for the proposition that the police are given carte blanche authority for trespassing on private property in order to obtain evidence to be used against any Defendant without any excuse for such trespass.

Moreover, *Katz* holds that searches conducted outside the judicial process, without prior approval by Judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Katz* v. *U.S.*, 389 U.S. at 357. Therefore, Petitioner's trespass theory must fail.

Before a discussion is had on the appropriateness of Petitioner's analysis of the theory of "open fields," it is important to point out perhaps the most fatal flaw in Petitioner's reasoning throughout its entire brief and the flaw in the State's reasoning with the Maine Courts in this case. Petitioner continues to treat Thornton's property as an "open field," even though both the Maine Superior Court and Maine Supreme Judicial Court held as a *matter of fact* that the area searched on Thornton's property was *not akin* to an open field. The Supreme Judicial Court noted:

> We note that the State's erroneous assumption that . . . the scene of the criminal activity occurred in an area akin to an 'open field' precludes the need for further Fourth Amendment analysis. The determination of a lawful search and seizure under Fourth Amendment analysis does *not* involve plugging in one of the several mutually exclusive theories or doctrines such as the 'open fields' doctrine, depending on the particular facts.

495 A.2d at 496; Pet. App. A23-A24.

On the facts of the present case, the area searched was neither "open" nor a "field." Since there was no definition of "open field" in *Hester*, the Maine Courts should be able to find whether or not an area is in fact an open field. To find that the area searched in the present case was not an open field, is clearly not erroneous.

The Maine Supreme Judicial Court in Thornton stated that it never rejected the open fields doctrine, however it simply found that it did not apply to the facts of the present case.

> We have recently noted that after *Katz*, the *Hester* doctrine remains *entirely intact* in Maine and elsewhere. *Dow*, 392 A.2d at 536, [referring to *State* v. *Dow*, Me. 392 A.2d 532 (1978)], (Emphasis Supplied.)

453 A.2d at 495; Pet. App. A 20.

The *Hester* and *Katz* decisions cannot be reconciled to hold that any area outside the curtilage of the home is not constitutionally protected. Such has never been the law of the State of Maine.

Petitioner's contention that to integrate *Hester* with *Katz* that a modern Fourth Amendment analysis represents a *per se* rule that any subjective expectation of privacy in an open field (and even a wooded area) is always objectively unreasonable for purposes of Fourth Amendment protection (Br. 20, 21) must fail.

There are two major problems with Petitioner's theory: First, the theory contemplates an extremely restrictive reading of *Katz* and ignores *Katz*' rejection of *Olmstead's* constitutionally protected area analysis. In addition, the tenor of the *Katz*' opinion is that it changed the standard for Fourth Amendment protection in most, if not all, factual situations. See e.g. *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (*Katz* applies to on the street situation.); *U.S.* v. *Rengifo-Castro*, 620 F.2d 230, 233 (10th Cir. 1980) (*Katz* applies to search of closed luggage.)

Second, Petitioner's contention that *Hester* should apply to the present situation broadens the *Hester* holding to apply to any area outside the curtilage, whether or not there were indicia of privacy and whether or not the area

was accessible or visible to the public. Unlike the present case, the area in *Hester* was accessible and visible to the public. Therefore, the argument that *Hester* is cited by *Katz* in later Supreme Court cases does not indicate that *Hester* may be construed beyond its facts to permit searches in areas which are not accessible or visible to the public.

Petitioner's *per se* rule that a reasonable expectation of privacy can never exist in an open field (and even a secluded woods) is a throwback to the antiquated notion of "constitutionally protected areas," which *Katz* prudently laid to rest. In addition, Petitioner's *per se* "protected area" rule includes not only open fields but heavily wooded areas as well. Basing Fourth Amendment rights solely on whether an area searched is inside or outside the curtilage seems to fly directly in the face of this Court's holding in *Katz*.

An analogy can be drawn between a *per se* rule which Petitioner would have this Court apply and the bright line rule of "legitimacy on the premises." The "legitimacy on the premises" rule advanced the notion that a person only had standing to complain of the Fourth Amendment violation if he was legitimately on the premises search, i.e., had a possessory interest in the premises searched. The Supreme Court in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), rejected the bright line rule "which at most has superficial clarity and which conceals underneath that center of veneer all the problems of line drawing which must be faced in any conscientious effort to apply the Fourth Amendment." *Id.* at 147. The court favored a case-by-case inquiry into whether the search violated the Defendant's reasonable expectation of privacy. *Id.* at 147-48. The same can be said for the bright line *per se* rule advanced here by Petitioner. Not only is Petitioner's rule fraught

with definitional problems, it avoids true Fourth Amendment analysis of a reasonable expectation of privacy.

The Petitioner complains that this Court must adopt a straight line or *per se* rule to be applied in the present case which would presumably be one capable of resolving all future Fourth Amendment litigation. Respondent Thornton urged that this cannot be done. However desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise, this Court (and the Supreme Judicial Court of Maine) has the burden of construing the Constitution not writing a statute or a manual for law enforcement officers.

In the case of *Ashwonder* v. *TVA*, 297 U.S. 288 (1966), this Court stated:

> Our institutional practice, based upon hard experience, generally has been to refrain from deciding questions not presented by the facts of the case. There are risks in formulating constitutional rules broader than required by the facts to which they are applied.

Id. at 346-348.

It is the above reasoning which the Maine Supreme Judicial Court used in deciding to suppress the evidence in the present case, and it is this reasoning which Petitioner urges this Court to continue using as it relates to a reconciliation between the open fields doctrine and the reasonable expectation of privacy analysis.

The holding of *Hester*, that federal agents could trespass onto an area *from which the public was not excluded* and view that which was *exposed to the public* view without violating the Fourth Amendment, remains intact after the *Katz* decision. See *Air Pollution Variance Board* v. *Western Alfalfa*, 416 U.S. 861 (1974). However, *Olm-*

stead's "constitutionally protected area" rationale has been overruled by *Katz*. Therefore, a modern Fourth Amendment analysis of searches in open fields would provide that warrantless searches for objects not exposed to the public, and located in areas from which the public is excluded, are subject to the reasonable expectations of privacy test of *Katz*.

In order for this Court to reverse the decision of the Maine Supreme Judicial Court, it must find, not only that the *Katz* test of expectation of privacy does not apply to an open field, but it must also hold that the area searched in the present case is in fact an open field. The Court must further hold that any expectation of privacy that an owner might have in an open field is as a matter of law unreasonable.

An analysis of the *Hester* and *Katz* decisions clearly justifies reasonable expectation of privacy analysis, which has been adopted by a plurality of courts in this nation.

In *Hester* v. *United States*, 265 U.S. 57 (1924), revenue officers concealed themselves in an open field belonging to Hester's father. *Id.* at 58. They observed *Hester* hand a quart bottle to a person named Henderson. *Id.* When an alarm was given, Hester removed a jug from his car and began running with Henderson. *Id.* One of the officers pursued them and fired a pistol. *Hester* dropped the jug, and Henderson threw away the bottle. The officer examined the two containers and recognized the contents as distilled whiskey. Because the officers had not obtained a warrant, *Hester* claimed that his Fourth Amendment rights had been violated. Justice Holmes, writing for the unanimous Court, refused to find the search illegal stating:

> It is obvious that, even if there had been a trespass, the above testimony was not obtained by an

> illegal search or seizure. The defendant's *own acts*, and those of his associates, *disclosed the jug*, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. . . . 4 Bl. Com. 223, 225, 226.

Id. at 58-59.

Three years after *Hester*, in *Olmstead* v. *United States*, 277 U.S. 438 (1928), this Court ruled on a search conducted by Federal officers using telephone wire taps. *Id.* at 455. The Defendant claimed the wire taps constituted an illegal search and seizure under the Fourth Amendment. This Court, however, analogized the search to the one conducted in Hester by noting that while "there was a trespass, there was no search of a person, houses, papers or effects." *Id.* at 465. This Court concluded that the Fourth Amendment was not violated unless there had been an official search and seizure of a person, his papers, or his material effects, or an "actual physical invasion of his house" or curtilage "for the purpose of making a seizure." *Id.* at 466.

After the decision in *Olmstead*, the *Hester* holding could best be stated as follows: The open field area beyond the curtilage is not an area entitled to Fourth Amendment protection. The *Olmstead* "open fields" doctrine core, was, therefore, that an open field was not a "consitutionally protected area." Because the Court in *Olmstead* failed to define "curtilage," and the *Hester* court failed to define "open field," the result has been that some courts have given a broad interpretation to the "open" component.[4]

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[4] See, e.g., *Janney* v. *United States*, 206 F.2d 601, 603,604 (4th Cir. 1953) (Search incident to warrantless arrest valid; fenced land considered open fields under *Hester*). But see *State* v. *Boynton*, 58

Similarly, some Courts have broadly interpreted "field" beyond the literal definition of a place suitable for pasture or tillage.[5]

However, in *Katz* v. *United States*, 389 U.S. 347 (1967), this Court rejected the Fourth Amendment "constitutionally protected area" or actual physical invasion analysis epitomized by *Olmstead* in order to trigger the protections of the Fourth Amendment. *Katz* held that the Fourth Amendment protects people, not simply places, against unreasonable searches and seizures. The Court stated:

> [W]hether or not a given "area" viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. The Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject for Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-352.

Hawaii 530, 536, 574 P.2d 1330, 1334 (1978) (Search illegal where police informant climbed six foot five foot fence to see marijuana plants). See, e.g., *McDowell* v. *United States*, 383 F.2d 599, 602-603 (8th Cir. 1967) (Search in open field valid under *Hester* despite "No Trespassing" signs). But see *State* v. *Byers*, 359 So.2d 84, 86 (La. 1978) (Search illegal where property posted with signs and marijuana not visible from public road).

[5] See, e.g., *State* v. *Caldwell*, 20 Ariz. App. 331, 333, 335, 512 P.2d 863, 865, 867 (1973) (Unreasonable to assume marijuana in desert 100 yards from house would not be noticed and reported); *State* v. *Aragon*, 89 N.M. 91, 94, 547 P.2d 574, 577 (1976) (Upholding search of tin can found on weed-covered, unoccupied property); *Anderson* v. *State*, 133 Ga. App. 45, 46, 209 S.E.2d 665, 666 (1974) (Open beach).

In *Katz*, FBI agents attached electronic recording devices to the outside of a public telephone booth from which Defendant placed his calls. The Defendant claimed that the bugging violated his Fourth Amendment rights. *Id.* at 348-349. Both the government and the Defendant submitted lists of "protected areas" for the Court's condiseration of whether the Fourth Amendment could be applied to a telephone booth. *Id.* at 351 n.8. This Court, however, rejected the arguments of both parties stating that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected areas.'" *Id.* at 350. ". . . We have never suggested that this concept can serve as a talismanic to every Fourth Amendment problem." *Id.* at 351 n.9.

This Court rejected the government's contention that the agents' activities should not be tested by the Fourth Amendment because the surveillance technique used by the FBI agents involved no physical penetration of the telephone booth from which the Defendant made his calls. The Court stated:

> It is true that the absence of physical penetration was at one time thought to foreclose further Fourth Amendment inquiry *Olmstead* v. *United States*," (Citation omitted) ". . . but [t]he premise that property interest control the right of government to search and seize has been discredited." *Warden* v. *Hayden*, 387 U.S. 294, 304.

Katz v. *United States*, 389 U.S. 347, 352, 353 (1967).

In departing from the narrow view expressed in *Olmstead*, this Court held that the government's conduct violated the privacy upon which the Defendant justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. *Id.* at 359.

Justice Harlan suggested in his concurrence in *Katz*, a two-prong test to determine whether Fourth Amendment protection applies to a particular case; this two-prong test has recently been upheld by this Court in the case of *Smith* v. *Maryland*, 442 U.S. 735 (1979). The inquiry is as follows: First, whether the individual has exhibited an actual (subjective) expectation of privacy; and second, whether this expectation is one that society is prepared to recognize as "reasonable," *Katz*, 389 U.S. 347 (1967); *Smith* v. *Maryland*, 442 U.S. 735 (1979).

The open fields-curtilage distinction, therefore, is only useful in analyzing the scope of "constitionally protected areas" and is not dispositive in determining whether a "reasonable expectation of privacy" exists. In the present case, it must be re-emphasized that the area searched was not even an open field.

Although it is quite clear that *Katz* did not overrule *Hester*, it must be argued that it did undermine any *per se* interpretation of the "open fields" doctrine by dispensing with the notion of a "constitutionally protected area" and by substituting a "reasonable expectation of privacy" analysis.[6] This is the analysis which the Maine Supreme Judicial Court correctly adopted in the present case.

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[6] See *United States* v. *Lace*, 669 F.2d 46, 55 (2d Cir. 1982) (Newman Jay concurring) (If *Hester* means Fourth Amendment does not extend beyond house, then its validity has not survived *Katz*' holding or rationale.); *United States* v. *Freie*, 545 F.2d 1217, 1223 (*Hester* no longer has independent meaning.); *United States* v. *Mullinex*, 508 F. Supp. 512, 514 (E.D. Ky. 1980) (Open fields not *per se* outside Fourth Amendment protection, but Defendants' expectation of privacy must be considered reasonable by society.); *State* v. *Weigand*, 289 S.E.2d 508, 510 (W.Va. 1982) (Cases generally hold "open fields" doctrine must consider "whether area bore indicia of expectation of privacy" (Citations omitted)).

Because Justice Harlan cited *Hester* in his concurrence in *Katz* stating that:

> An enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy.

Id. at 360.

and because he noted further that:

> Conversations in the open would not be protected against being overheard for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361.

some courts have focused on these two citations as well as other Supreme Court citations noting that *Hester* has not been overruled for supporting decisions which utilize the *Hester* "open fields" doctrine as a *per se* exception to the Fourth Amendment. However, as stated earlier, *Katz* rejected *Olmstead's* contribution to the doctrine that the area beyond the curtiliage was not a "constitutionally protected area," holding that whenever there is a reasonable expectation of privacy, the Fourth Amendment protections are invoked. Therefore, if there is such an expectation of privacy in an area beyond the curtiliage, these protections should apply, and they, of course, should apply in the present case.[7]

Even in the recent case of *United States* v. *Ross*, 102 S. Ct. 2157 (1982), this Court cited with approval the principles set forth in *United States* v. *Chadwick*, 393 F.Supp. 763, 772 (D. Mass. 1975), where the government errone-

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[7] The Maine Court has never ruled on the issue of whether or not the area searched was beyond the curtilage of Respondent Thornton's residence.

ously contended that the warrant requirement applied only to searches of homes and other "core" areas of privacy:

Writing for the *Chadwick* Court, the CHIEF JUSTICE stated:

> '[I]f there is little evidence that the Framers intended the Warrant Clause to operate outside the home, there is no evidence at all that they intended to exclude from protection of the Clause all searches occurring outside the home. The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America. Thus, silence in historical record tells us little about the Framers' attitude toward application of the Warrant Clause to the search of Respondent's footlocker. What we do know is that the Framers were men who focused on the wrongs of that day but who intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth.' 433 U.S., at 8-9, 97 Sup. Ct., at 2481-2482 (footnote omitted).

U.S. v. *Ross*, 102 S. Ct. at 2165.

In addition, it must be noted that in *Hester* the Defendants were in the "open." There was no mention in the Court opinion of any attempts to exclude the public; there were apparently no fences, no signs, and no significant attempts at concealment. The Court's noticeable failure to mention any such attempts implies that no attempts to exclude the public existed. A person in this situation could be determined to be "in the open," and, therefore, not to have a reasonable expectation of privacy. Therefore, the two terms are complementary. When a person has an actual and reasonable expectation of privacy in an area, then by definition, that area is no longer in the open.

If he does not have a reasonable expectation of privacy in the area, then it is in the open with regard to his Fourth Amendment protections, and *Hester* may apply. Thus, *Katz*, in effect, recognizes that *Hester* applies only when an area is literally open, and the Defendant has no expectation of privacy in it. See J. Glickman *Katz in Open Fields*, 20 Amer. Cr. L. Rev. 493 (1983).

In the present case, there were signs, fences and attempts at concealment, and both the Maine Superior and Supreme Judicial Courts held that Thornton's property was not in the open, and that he made attempts to conceal his property.

The Courts that have held that there can never be a reasonable expectation of privacy in an open field, even when there are substantial efforts to exclude the public, have based their conclusion on the *very nature* of an open field, its openness and usual expansiveness. See *Giddens* v. *State*, Ga. App., 274 S.E.2d 595, 596 (1980). In the present case, the area searched again was not an open field. The area was a "heavily wooded area" and in no sense could it literally be open. *Thornton*, 453 A.2d at 494, 495; Pet. App. A18, A19, A22, A23. Furthermore, although not applicable to the present case, the nature of the open field should not be dispositive; however, because although privacy may not always be expected in an open field, the nature of the field may be altered in a manner which gives rise to a constitutionally protected privacy interest. The precautions that a person takes in insuring privacy should not be ignored. The *Katz* Court stated:

> "What [a person] seeks to preserve as private, even *an area accessible to the public*, may be constitutionally protected." *Katz* v. *United States*, 389 U.S. at 351-352 (1967).

Respondent is not alone in his belief that the "open fields" exception to the warrant requirement can no longer be automatically invoked to validate a warrantless search and seizure which takes place outside the curtilage: *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1979), *cert. denied*, 448 U.S. 972 (1979), (the court stated that a property owner has a reasonable expectation of privacy in an outbuilding encompassed by a fence which might or might not include the residence); *United States* v. *DeBacker*, 493 F.Supp. 1078, 1081 (W.D. Mich. 1980) ("*Katz* compels a more sensitive reading of the Fourth Amendment . . . Instead of declaring entire areas as outside of Fourth Amendment protection, I believe *Katz* compels an analysis of the particular type of surveillance, and its effect on the privacy and security of citizens."); *State* v. *Lakin*, 588 S.W.2d 544, 549 (Tenn. 1979) (It is not unreasonable to require a police officer to obtain a warrant from an impartial magistrate prior to a search of an open field where marijuana is allegedly growing); *State* v. *Wert*, 550 S.W.2d 1,3 (Tenn. Crim. 1977) (50-acre farm which was enclosed by a fence is protected from a warrantless search); *Florida* v. *Brady*, 406 So.2d 1093 (Fla. 1981), *cert. granted*, 102 S.Ct. 2266 (1982) (there is a reasonable expectation of privacy in a 1,800-acre tract of land which is fenced, locked, occupied, and posted); *Burkholder* v. *Superior Court*, 96 Cal.App.3d 421, 158 Cal.Rptr. 86, 91 (1979) (an individual has a subjective expectation of privacy which is objectively reasonable in a partially fenced-in field).

Cases cited by Petitioner from other jurisdictions where Defendants did not have a reasonable expectation of privacy, or where the "open fields" doctrine applied are distinguishable from the present case. In a number of cases cited by Petitioner, the Defendant did not have an ownership interest or was not in possession of the area

searched, and in other cases there was no dwelling in the entire area; *U.S.* v. *Hare*, 589 F.2d 242 (5th Cir. 1979) (no expectation of privacy in an open, unfenced, unposted area near highway and apparently no ownership interest in land); *Sesson* v. *State*, 563 S.W.2d 799 (Tenn. 1978) (no evidence that Defendant owned or was in lawful possession of property); *State* v. *Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981) (individual has no legitimate expectation of privacy in open field in which there is no personal ownership or possessory rights); *Giddens* v. *State*, Ga. App. 274 S.E.2d 595 (1980), *cert. denied*, 450 U.S. 1026 (1981) (no reasonable expectation of privacy in field where there was no evidence of personal belongings as dwelling to show such privacy expectation, Defendant's expectation of privacy not reasonable); *Ford* v. *State*, 264 Ark. 141, 569 S.W.2d 105 (1978), *cert. denied*, 441 U.S. 947 (1979) (open field doctrine applied where no building was located on the entire property).

In some of the above and other cases cited by Petitioner, the area searched was, in fact, a "field." *U.S.* v. *Williams*, 581 F.2d 451 (5th Cir. 1978); *U.S. ex rel. Saiken* v. *Bensinger*, 546 F.2d 1292 (7th Cir. 1976), *cert. denied*, 431 U.S. 930 (1977), *Ford* v. *State*, 264 Ark. 141, 569 S.W.2d 105 (1978) *cert. denied*, 441 U.S. 947 (1979), *Giddens* v. *State*, Ga. App. 274 S.E.2d 595 (1980), *State* v. *Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981), *Commonwealth* v. *Janek*, 242 Pa. Super. Ct. 340, 363 A.2d 1299 (1976), *Bedell* v. *State*, 257 Ark. 895, 521 S.W.2d 200 (1975).

In *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), this Court cited *Hester* while referring to the "open fields" doctrine and held that a warrantless search was proper. In *Air Pollution Variance Board*, a health inspector trespassed on De-

fendant's outdoor business premises to conduct a pollution test of smoke emissions, *Id.* at 862-863. This Court found it significant, however, that what the inspector saw was visible to the public and that it had not been shown that the inspector was on premises from which the public had been exlcuded. *Id.* at 865. In the present case, however, the area where marijuana was allegedly found was not visible much less accessible to the public, and Respondent had excluded the public from his land therefore, this case must be distinguished from *Air Pollution Variance Board. Thornton*, 453 A.2d at 491; Pet. App. A3, A4; J.A. 94, 95, 62, and 65.

In *Harris* v. *United States*, 390 U.S. 234 (1968), *Hester* is cited for the proposition that "objects falling in the plain view of an officer who has a right to be in a position to have that view are subject to seizure." *Id.* at 236. It is significant to note that in both *Air Pollution Variance Board* and *Harris* above, *Hester's* applicability was to instances in which the officers were *legitimately* on the premises. Also in *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977), *Hester* is cited as supporting the proposition that where there is no invasion of privacy, there is no unconstitutonal search. (*Id.* at 352.) Therefore, the Supreme Juducial Court of Maine, holding that the legitimacy of the officers' presence should be examined for the applicability of the "open fields" doctrine, is consistent with this Court's holding in that area.

This Court has also upheld *Coolidge* v. *New Hampshire*, 40 U.S. 443 (1971) where the legitimacy of the officer's position is examined for the application of the "plain view" doctrine, *Texas* v. *Clifford James Brown*, 51 U.S.L.W. 4361, (No. 81-419), decided April 19, 1983.

Petitioner's reliance on cases where areas were observed by aerial surveillance misses the threshold ques-

tion. It is the government's burden of proof to show that the observations were, in fact, made that way without violating Respondent's expectation of privacy. The facts in the present case, of course, do not indicate that aerial surveillance was involved. Even if one were to assume that the forms of aerial surveillance relied upon by Petitioner were constitutional, the ground searches used in the present case are still illegal.

The reasoning Petitioner uses regarding aerial searches is unfounded. It is true that the possibility of aerial surveillance may preclude complete privacy in any area. Complete privacy, however, cannot be compared with a reasonable expectation of privacy. A person's physical inability to complete privacy in all circumstances and in all areas does not prevent a reasonable expectation of privacy. The expectation need only be reasonable; it need not be unassailable. See J. Glickman, *Katz in Open Fields*, 20 Amer. Crim. L. Rev. 494 (1983).

Reasonable expectations of privacy have been found in many locations that could not be totally secured against all forms of surveillance. In *Katz*, the Defendant had a reasonable expectation of privacy in the phone booth, even though it was not secured against electronic surveillance. Since *Katz* was not required to make this phone call in a surveillance-proof booth, the owners of property should not be required to construct opaque bubbles over their land. See *United States* v. *Allen*, 675 F.2d at 1373, 1380 (1980).*

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* In the brief of Amici Curiae submitted by the American Civil Liberties Union of Northern California, Mexican-American Legal Defense in Educational Fund and California Rural Legal Assistance

B. The Maine Supreme Juducial Court ruled correctly in holding that respondent Thornton had a reasonable expectation of privacy in the area searched in his rural and posted woods surrounding the alleged secluded marijuana patches.

Petitioner contends that Respondent Thornton could not have had a reasonable expectation of privacy in the area searched because the Court's prerequisite for determining whether the "open fields" doctrine applied was incorrect:

1. The openness with which the activities pursued; and

2. The lawfulness of the officers' presence during their observation of what is open and patent.

Petitioner's analysis of whether the "open fields" doctrine applies in the present case can be dispensed with

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in support of the Petitioner in *United States* v. *Oliver*, 686 F.2d 356 (6th Cir. 1982), Amici Curiae stated as follows:

> The government asserts that aerial searches are constitutional, and that the farmer must have a diminished expectation of privacy with respect to *ground* searches . . .
>
> * * *
>
> This reasoning is exactly backwards. At times, interpretation of the Fourth Amendment has lagged behind the newer technologies of surveillance, compare *Olmstead* with *Katz*, and thus newer methods of invading privacy were temporarily not perceived as "searches" or "seizures" . . . but the Court has never seen these newer technologies as an excuse for abandoning *established* safeguards . . . the prohibition of warrantless searches on private property has always been at the very core of the Fourth Amendment. The government's approach, however, instead of expanding the amendments reached to meet the times, would abandon even the established core of safeguards as no longer suitable . . .

(Amici Curiae, Br. 40).

from previous discussions of that theory in this brief. The fact that Respondent had a reasonable expectation of privacy has also been discussed. However, Petitioner misconstrues the Maine Supreme Judicial Court's definition of "reasonable expectation of privacy." Such a definition does not include only whether there was a *subjective* expectation of privacy, but in all Maine cases where there is a "reasonable expectation of privacy," there has been a reasonableness or objectivity test, and such analysis took place in the present case. In case of the *State* v. *Peakes*, 440 A.2d 350 (1982), which Petitioner incorrectly relied upon in its brief to the Maine Supreme Judicial Court for its contention that Thornton did not have a reasonable expectation of privacy, the Maine Supreme Judicial Court noted that "the Defendant correctly notes that his garden was not open or exposed to the public," this requirement of openness was not enough for the Maine Court because the Court stated "but the Defendant made no attempt to conceal the garden from the view of his neighbors. He cannot be said to have had an *actual* expectation of privacy in the garden under these circumstances." *Id.* at 352. (Emphasis Supplied.)

Petitioner does not distinguish between whether:

1. Respondent had an expectation of privacy in the area searched which was reasonable; and,

2. Whether the conduct of the police in searching the property is unreasonable.

The Court in the present case clearly found that Respondent's subjective expectation of privacy was one that society was prepared to recognize as reasonable in that it cited many cases arising in Maine where the two-fold test was explained. See *United States* v. *Taylor*, 515 F.Supp. 1321 (1981), where the Court stated "in order to merit

constitutional production, an individual's subjective expectation of privacy must be one that society is prepared to recognize as reasonable." *Id.* at 1326.

In *United States* v. *Hensel*, 509 F.Supp. 1364 (D. Me. 1981), the Court stated that the Defendant's subjective expectation of privacy was not controlling, but rather his expectation of privacy must be objectively reasonable.

Turning to the reasonableness of the police conduct in the present case, the Court was correct in examining the officers' position of observation and the openness of the conduct. The Respondent would not be afforded the constitutional protection if his activity was open, patent, or knowingly exposed to public. The Maine Supreme Judicial Court cited various Maine cases in the *Thornton* decision, analyzing a determination of openness. Further, the Court's examination of the legitimacy of the officers' presence on the Respondent's property is also completely in accord with cases in Maine and other jurisdictions. If the police were legitimately on the premises, in some situations, even though there was a subjective expectation of privacy, that expectation of privacy would not be objectively reasonable. Such examples were cited by the Maine Supreme Judicial Court in its opinion in Thornton as follows:

> The *State* v. *Peakes*, 440 A.2d at 353
>
> "The officers observed something which was "open and patent" to the Defendant's neighbors and their invitees," and such observation was made on neighboring land.
>
> The *State* v. *Dow*, 392 A.2d at 535,
>
> "[T]he warden who apparently had as much right to be in a parking lot as Defendants, merely observes that which was completely open to public . . ."

The testimony at the suppression hearing was overwhelming regarding the Respondent's expectation of privacy in the area searched. There were twelve exhibits showing by photograph the remoteness of the area searched, including the "garden spots" and Linda Thornton (Respondent's wife) testified extensively regarding their expectation of privacy. Even the police testified as to the remoteness of the area searched. However, Petitioner argues that because the activity was conducted outdoors in a secluded location, that any expectation of privacy is not objectively reasonable. Petitioner's rationale, again, is a throwback to the *Olmstead* protected area analysis, and is further contradicted by cases in Maine and other jurisdictions.

The problem with Petitioner's theory is that it is too restrictive. The Maine Supreme Judicial Court not only looked at whether the activity was conducted outdoors, it examined whether the activity was open, patent and exposed to the public, which, of course, it was not.

Petitioner incorrectly states that the "patches themselves were located about 500 feet from the Thornton house." (Br. 51). Linda Thornton testified that the area searched was approximately 250 feet from the driveway. Since the Thornton residence was between the "patches" and the driveway, it would be impossible for the patches to be located 500 feet from the residence (J.A. 45, 46, 47). It was also never established that the officers "never came near the house." (Br. 51).

Petitioner misconstrues the cases in Maine and elsewhere regarding the burden of proof. It is also significant to note that this issue was never raised to the Maine Supreme Judicial Court by Petitioner. It has always been the law of this state that warrantless searches are, *per se*, unreasonable subject to a view specifically established,

carefully drawn and much guarded exceptions, and the burden is on the state to prove, by fair preponderance of the evidence, the underlying *facts* bringing the case within one of the exceptions. See *State* v. *Philbrick*, 436 A.2d 844 (Me. 1981).

Petitioner further erroneously goes on to state that the burden of proof was on the state to show that Thornton's expectation of privacy in his woods was unreasonable. This was never the case and even if it were, it is clear by the testimony of all of the individuals at the suppression hearing and the numerous exhibits introduced at said hearing that the burden of showing that Thornton had an expectation of privacy was clearly met.

Petitioner misconstrues the burden of proof in this case with a "standing" analysis. The burden of proof to establish *standing* to challenge the search and seizure is in fact on the Defendant; to have actual standing, the Defendant must establish a legitimate and reasonable expectation of privacy in the premises searched *or the property seized. U.S.* v. *Balsamo*, 468 F.Supp. 1368 (D. Me. 1979). *State* v. *Dunlap*, 395 A.2d 821 (Me. 1978).

The brief for Amici Curiae filed by the State of Alabama, and joined by Alaska, American-Samoa, Arizona, Colorado, Delaware, Kansas, Kentucky, Nebraska, Utah, Vermont, West Virginia, Wisconsin and Wyoming is not applicable to the present case because the question presented in its brief is not the same question presented to the Supreme Court in *State* v. *Thornton*.Amici Curiae presented the following question:

> "Does the Fourth Amendment extend to open fields which are fenced and posted with No Trespassing signs?"

In the present case, the Maine Supreme Judicial Court held that the "open fields" doctrine was inapplicable,

therefore, the question presented has no relevance. Further, Amici Curiae states at pages 4 and 5 of its brief that "the issue in this case is whether *Hester*, above, was overruled by *Katz* v. *United States* (citation omitted). That, of course, is not the issue in this case.

Amici Curiae's first argument that open land, even if privately owned is never private, again does not address the issue in this case. Rather, the argument applies to fish and game laws and the "open land" discussed by Amici Curiae is not the same as the area searched in the present case. It does not follow that because insects and wildlife go onto private land, police can go on private property and make searches without a search warrant.

Amici Curiae's argument that police should be able to indiscriminately go on individual's privately owned land to search aimlessly for trespassers (Amici Curiae Br. at 19) does not even make logical sense nor is such a theory supported by any case law.

III. Petitioner Raised Additional Questions And Changed The Substance Of The Question Presented In Its Petition For Writ Of Certiorari And In Its Appeal To The Maine Supreme Judicial Court.

Rule 34 of the Rules of the Supreme Court of the United States appears in pertinent part as follows . . .

> "The phrasing of the questions presented need not be the identical with that set forth in the jurisdictional statement or the petition for certiorari, *but the brief may not raise additional questions or change the substance of questions already presented in those documents . . .*" (Emphasis Supplied).

Petitioner's brief essentially discusses one theory; whether in terms of *Katz*, *Hester* represents a *per se* rule that any subjective expectation of privacy in open fields or wooded areas is unreasonable. This theory was never

raised by Petitioner in its arguments to the Maine courts or in its Petition for Writ of Certiorari. The State now urges the creation of a new *per se* exception to the warrant requirement to cover this case. It is too late to raise this issue, as it was not raised in either Petitioner's Writ of Certiorari or in its appeal to the Maine Supreme Judicial Court.

CONCLUSION

Respondent Thornton urges this Court to affirm the Judgment of the Maine Supreme Judicial Court and to allow this State to develop its own law regarding warrantless search and seizures as such developing law is not in conflict with cases decided by this Court. For the Maine Supreme Judicial Court to apply a reasonable expectation of privacy analysis to the present cases is clearly not erroneous. Noting that the "open fields" doctrine was still viable in Maine, the Maine Supreme Judicial Court did nothing to the *Hester* doctrine except to say that it did not apply to this case. A State court should be free to make that determination.

If this Supreme Court reverses this case, then the *Hester* doctrine will be broadened and will replace the *Katz* doctrine in this case, and the issue of what constitutes a constitutionally protected area will be reincar-

nated. Therefore, pursuant to the foregoing argument, the Judgment of the Supreme Judicial Court of Maine in *State of Maine* v. *Richard Thornton*, 453 A.2d 489 (Me. 1982), should be affirmed.

Respectfully submitted,

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